Supreme Court, U.S.
FILED
MAY 23 1995
OFFICE OF THE CLERK

No. 94-1834

In The

Supreme Court of the United States

October Term, 1994

HARVEY M. ALPER, HENRY P. TRAWICK, JR., AND JOSEPH W. LITTLE,

Petitioners,

vs.

THE STATE OF FLORIDA (THE FLORIDA BAR),

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Petition present a substantial question when all of the issues raised have recently been addressed by this Court and the decision below is not in conflict with any decision of this Court or any other court which would justify the issuance of a writ?

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SUMMARY OF ARGUMENT

The decision below cannot be read, either directly or by implication, to be in conflict with any decision of this or any other court. The issues challenged below were no longer current programs of the Bar at the time of the challenge, and the Florida Supreme Court issued no opinion with its decision.

Even if the Florida Supreme Court had addressed the merits of the Petition, the case would present no issue worthy of this Court's review. The Bar's rules were held by the Eleventh Circuit to be in compliance with the procedural requirements announced by this Court and this Court found no flaw in the rules when it initially granted certiorari to review them and then dismissed.

This case presents no basis for review of the associational question left undecided in *Keller v. State Bar of California*. The Florida Supreme Court has restricted the political and ideological activities of The Florida Bar, whether or not funded by compulsory dues, to those which meet the criteria announced in *Keller*.

ARGUMENT

The Petition for Certiorari fails to present a substantial question justifying issuance of a writ in that all of the issues raised have recently been addressed by this Court and there is no conflict between the decision of the Court below and any decision of this Court or any other appellate court which would justify review.

The Florida Supreme Court rendered no opinion, expressed or implied.

The petition for certiorari argues that the decision below of the Florida Supreme Court conflicts with decisions of this Court relating to use of compulsory bar dues and, in addition, implicates the issue of compelled association. In the first place, the decision below neither states nor implies anything that could be determined to have been in conflict with a decision of this Court or any other court. In their petition filed with the Florida Supreme Court, the Petitioners challenged two activities engaged in by The Florida Bar. In its response, the Bar stated:

> Neither of the challenged activities involve current programs of the Bar. Standing Board Policy 9.20(d) provides that a legislative position adopted by the Board remains in effect for the biennial legislative session following its adoption, unless reversed or rescinded. The merit retention position last adopted by the Board lapsed in July, 1994 and has not been readopted since. The merit retention pamphlets which Petitioners complain of were last distributed prior to the November, 1994 election and no decision

> has been made by the Board with respect to future distribution of similar pamphlets.

Pet. App. 39a-40. The Florida Supreme Court denied the petition without opinion. *Pet. App.* 1a. The Court may well have denied the petition simply because the issues raised were not timely.

The Florida Bar's rules meet Constitutional requirements.

Even if the Florida Supreme Court had expressly upheld the positions being challenged by the Petitioners, it would raise no issue justifying review by this Court. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), this Court laid out the procedures which a bar must follow in order to fund political or ideological activities with compulsory bar dues without violating its members' First Amendment rights. In direct response to the *Hudson* decision, The Florida Bar adopted an elaborate procedural code specifically designed to comply with the *Hudson* requirements. Those procedures were reviewed and upheld by the Eleventh Circuit Court of Appeals in *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990).[1] This Court initially granted certiorari to review the decision of the Eleventh Circuit. However, after receiving briefs and hearing oral argument, the Court dismissed the petition as having been improvidently granted. *Gibson v. The Florida Bar*, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991).

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[1] The Bar's procedures were laid out verbatim in footnote 8 to the *Gibson* opinion.

The procedures reviewed in *Gibson*, among other things, provided for publication in The Florida Bar News, a newspaper distributed to every member, of notice of the adoption by the Board of Governors of the positions which the Petitioners now challenge. The rules allowed Petitioners 45 days in which to file objections with the Bar. Upon receipt of such objections, the Bar was required by its rules to promptly determine the pro rata amount of the objecting member's dues at issue and either return such amount to the members or place it in escrow pending a *Hudson* type hearing. The record does not reflect that the Petitioners ever filed objections to the positions as permitted by the rules.[2]

This case does not implicate associational rights.

In *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), this Court held that an integrated bar such as the State Bar of California could constitutionally use compulsory dues to fund activities which are germane to the State's interest in regulating the legal profession and improving the quality of legal services. The Court declined to decide the broader question of whether a lawyer could be compelled to associate with a bar which engaged in political or ideological activities which were not germane to such interests, but which were not funded by compulsory dues. The Petitioners herein state that this case implicates the associational

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[2] In addition to the *Hudson* procedures, the Florida Supreme Court allows any member to file a petition directly with the Court to challenge a position of the Bar as being beyond the scope of its authority as defined by the Bar.

rights which the Court left open in *Keller*. They are incorrect.

As noted above, the decision below expressed no opinion, much less an opinion regarding the Petitioners' associational rights, and cannot be read to have implicitly addressed such rights. Furthermore, the scope of authority of The Florida Bar, as defined by the Florida Supreme Court, does not provide a foundation for this Court to address the associational issue.

There is a significant difference in the authority of The Florida Bar and the authority of both the State Bar of California, as discussed in *Keller*, and the Puerto Rico bar, as discussed by the First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), cited by the Petitioners. The authority of the California and Puerto Rico bar associations at the time those cases were decided permitted them to engage in activities well beyond the scope of those which could be funded with compulsory bar dues. The authority of The Florida Bar, in contrast, has been circumscribed by the Florida Supreme Court so that its power to engage in political and ideological activities is no broader than its right to use compulsory dues to fund such activities.

In *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), the Florida Supreme Court defined the outer limits of Florida Bar activity, and provided that any member in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a

timely petition directly with the Court.[3] This Court's decision in *Keller* was decided six months after *Schwarz*, and a year later the Florida Supreme Court analyzed the relationship of the two decisions in *The Florida Bar re Frankel*, 581 So.2d 1294 (Fla. 1991). It concluded that the outer limits of permissible political and ideological activity by The Florida Bar was not greater than the limits on funding of such activities with compulsory dues as set out in *Keller*.[4] Thus, because The Florida Bar is not permitted to engage in lobbying activities which are outside the *Keller* criteria, with or without the use of compulsory dues, no opportunity for addressing the associational issue is presented.

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[3] The Florida Supreme Court has exclusive jurisdiction over regulation of attorneys' pursuant to Article V, Section 15 of the Florida Constitution.

[4] The Court found that the six lobbying activities challenged by the Petitioner were all beyond the scope of permissible Bar activity, ordered that the petitioner's pro rata share of dues be returned, and enjoined the Bar from continuing to engage in such activities.

CONCLUSION

The Court is respectfully urged to deny the Petition for Certiorari.

Respectfully submitted,

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